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CITY SECRETARY

GABE NESBITT PARK TENNIS COMPLEX

**PROFESSIONAL FULL TENNIS SERVICES
MANAGEMENT AGREEMENT**

by and among

**THE CITY OF MCKINNEY, TEXAS,
a municipal corporation**

and

**LIFETIME TENNIS, INC.
a Texas corporation**

February 3, 2012
(the "**Execution Date**")

PROFESSIONAL FULL TENNIS SERVICES MANAGEMENT AGREEMENT

THIS AGREEMENT is made and entered into as of this 3rd day of _____ February, 2012, by and between the CITY OF MCKINNEY, a Texas municipal corporation (hereinafter "City"), and Lifetime Tennis Inc., a Texas corporation. (hereinafter "Manager").

WHEREAS, City desires to provide professional tennis services for the convenience and enjoyment of the public; and

WHEREAS, City desires a professional manager capable of assuming the complete operation of Gabe Nesbitt Park Tennis Complex and all related facilities; and

WHEREAS, Manager is engaged in professional tennis management services business and is prepared, equipped and qualified to undertake such operations, and provide all services required hereunder at the Tennis Complex; and

WHEREAS, said Manager represents that it is capable of providing an accounting to City of all receipts and disbursements and of maintenance of the facilities and equipment, all in accordance with provisions of this Agreement as negotiated by said Manager and City; and

WHEREAS, said professional manager is needed to provide for maintenance of the complex and of facilities and equipment at a professional service level; and

WHEREAS, Manager assures City that it has developed expertise with respect to successful and efficient management and operation of tennis facilities at comparable sites and has reviewed construction documents related to Gabe Nesbitt Park Tennis Complex and related facilities; and

NOW, THEREFORE, for and in consideration of the mutual promises, covenants and conditions herein contained, the parties hereto agree as follows:

ARTICLE I DEFINITIONS AND INTERPRETATIONS

As used herein, the following words and phrases shall have the meanings set forth below:

1.01 **Director**

"Director" means the Director of Parks, Recreation and Open Space of the City, and any of his authorized representatives.

1.02 **Business Year**

"Business Year" means a fiscal year, commencing October 1 and ending September 30.

1.03 **Tennis Complex Premises**

"Tennis Complex Premises" means any area where Manager's tennis complex management activities are carried out with regard to this Agreement. The Tennis Complex Premises shall include any and all buildings, improvements and landscaping on the property designated as the Gabe Nesbitt Park Tennis Complex, as generally depicted on the site map which is part of Exhibit C, attached hereto and incorporated by reference herein for all purposes. Further the Tennis Complex Premises shall include the two (2) tennis courts located at Evans Middle School, 6998 Eldorado Parkway, McKinney, and the one (1) tennis court located at Faubion Middle School, 2900 Rollins St., McKinney (collectively "Middle School Courts"). The Middle School Courts are located on McKinney Independent School District ("MISD"), but are operated by the City pursuant to an Memorandum of Understanding between the City and MISD. The City specifically appoints Manager as its agent under the MOU to operate the Middle School Courts and Manager shall have all the rights and responsibilities, as provided under the MOU. Should Manager and City disagree regarding whether a particular site shall be considered part of the Tennis Complex Premises; the Director's decision shall prevail. Any final determination by the Director regarding the Tennis Complex Premises shall be in writing. The Tennis Complex Premises may also be referred to as the "Tennis Complex."

1.04 **Gross Receipts**

"Gross Receipts" means Manager's gross revenue from all Manager's sales and services made or provided in connection with Manager's operations at the Gabe Nesbitt Park Tennis Complex, as otherwise provided under the terms and conditions of this Agreement, whether made or provided upon the basis of cash payment or on credit (whether collected or not); provided, however, there shall be excluded or deducted, as the case may be, from Gross Receipts the following:

- A. All sales taxes, and retailers' excise taxes, paid or collected by or payable by Manager, but only if such taxes are added to the selling price and separately stated from the selling price of merchandise or services, and collected from customers.
- B. All bona fide credits or refunds made by Manager to customers in regard to merchandise sold or services provided by Manager.
- C. All sums or credits received in settlement of claims for loss or damage to merchandise and assets.

1.05 **Auditor**

Member(s) of finance staff of City of McKinney.

1.06 **Operating Expenses**

Operating Expenses shall include all costs and expenses necessary for the operation of the tennis complex, including all tennis complex facilities, in the ordinary course of business, to include, but not be limited to, the following: insurance (100% if separate policy for City);

utilities; any management fee(s); depreciation; amortization; tennis rental fees and the cost of salaries, wages and benefits of the Manager. Operating Expenses shall be the sole responsibility of the Manager and determined in accordance with generally accepted accounting principles consistently applied.

1.07 **Cost of Goods Sold**

"Cost of Goods Sold" is as determined by generally accepted accounting principles consistently applied.

1.08 **Operations**

The business and commercial operations and affairs of Manager conducted in the ordinary complex of business of the Tennis Complex and related facilities.

1.09 **Operation Budget**

"Operating Budget" is a schedule of all anticipated revenues and all estimated expenses for tennis operations at Gabe Nesbitt Park Tennis Complex for each fiscal year period, beginning October 1 and ending September 30, as developed by Manager.

1.10 **Facility Capital Improvement**

Facility Capital Improvement is any construction project which extends the useful life and/or increases the capacity of the tennis complex facilities. For the purpose of this Agreement, tennis court net and wind screen replacement or repair shall not be considered a Facility Capital Improvement.

1.11 **Term Clarification**

In the event of any conflict in the definition or interpretation of any word, responsibility, service or schedule between this Agreement and the exhibits attached hereto, said conflict or inconsistency shall be resolved by giving precedence in the following order: first to the Agreement; then to the Exhibits to the Agreement.

**ARTICLE II
SPECIAL CONDITIONS**

2.00 **Gabe Nesbitt Park Tennis Complex Premises**

A. **Tennis Complex Ownership and Name**

The Gabe Nesbitt Park Tennis Complex consists of lands owned in fee by City. The name of the Tennis Complex shall remain the same unless changed by City. Manager has the right under this Agreement to pursue proposals or offers for naming rights of the Tennis Complex; provided, however, that any proposal or offer received by the Manager is subject to the approval of the City Council.

Further, the City shall have final authority to accept the terms and conditions of a proposal or offer for naming rights, if any.

B. Use of Tennis Complex

The Tennis Complex Premises, as shown on the site map which is a part of Exhibit C, shall be used only and exclusively for tennis complex operations and for such other, related purposes for which express approval is granted by the Director, and for no other purpose whatsoever.

C. Manager's Acceptance of Physical Condition

Manager acknowledges personal inspection of the Tennis Complex Premises and the surrounding area and evaluation of the extent to which the physical condition thereof will affect the operation of the Tennis Complex. Manager accepts the Tennis Complex Premises in its present physical condition and agrees to make no demand upon City for any improvements or alteration thereof.

D. Approval Required for Alterations

Any improvements (including Facility Capital Improvements), additions, alterations or changes to the Tennis Complex Premises shall be subject to prior written approval by the Director, securing of applicable permits and compliance with such terms and conditions as may be imposed thereon by City.

E. No Property Interest of Manager

Manager hereby acknowledges the title of City in and to the Tennis Complex Premises and the improvements located thereon, and covenants and agrees never to assail, contest or resist said title, nor to assert with respect thereto any property interest of Manager.

F. Ownership of Improvements

Ownership of all existing structures, and of all structures, buildings and/or improvements constructed by City or by Manager upon the Tennis Complex Premises and all alterations, additions or betterments thereto, shall immediately vest and be vested in City at all times during and after the term hereof. City shall retain at all times the right to possession of such structures, buildings and/or improvements.

2.01 General Scope of Services

Manager shall have the exclusive right, license, privilege, and duty to operate and maintain the Tennis Complex Premises. The scope of services required of the Manager under terms of this Agreement includes:

A. Overall Complex Management in accordance with City tennis policy, maintenance and operations standards.

1. Pro shop operations;
2. Court reservations;

3. Racquet Stringing;
 4. Tennis Lessons;
 5. League formation and operations;
 6. Ball Machine rental;
 7. Food and beverage service;
 8. Equipment maintenance to City's and manufacturers' specifications; and
 9. Court and Ground maintenance.
- B. Create and approve Tennis Complex Operating Budget;
 - C. Approve or disapprove any and all expenses;
 - D. Collection and accounting of all revenues;
 - E. Ensuring payment, processing for payment and accounting of all expenses in a timely manner;
 - F. Formulation and implementation of operating programs, business plans, and budgets;
 - G. Handling of personnel including employment, training, and terminations;
 - H. Preparation of monthly and annual financial operating statements;
 - I. Purchase, retain, repair and replace maintenance equipment to manufacturers' specifications;
 - J. Maintain the Tennis Complex utilities and all appurtenances in conformity with City's specifications;
 - K. Plan and carry out advertising and marketing program for the Tennis Complex;
 - L. Attend to all other matters necessary or expedient for the efficient performance of the Tennis Complex operations.

Manager shall commence operations pursuant to this Agreement upon execution. After commencement of operations pursuant to this Agreement, Manager shall operate the Tennis Complex in accordance with the terms and conditions herein and City policies.

Manager shall conduct no other operations or activities upon the Tennis Complex than as are set forth herein.

2.02 **City's Responsibilities**

City shall perform the following duties:

- A. Administer all terms and conditions of this Agreement;

- B. Monitor standards and specifications;
- C. Review and approve or disapprove, in advance, any alterations to existing facilities;
- D. Approve fee schedule recommended by manager (Exhibit B);
- E. Determine, fund and implement capital improvements;
- F. Ensure building maintenance to City's specifications and standards; and
- G. Repair tennis court lights and absorb tennis court light utility costs.

2.03 **Term**

- A. The term of this Agreement shall commence upon execution of this Agreement and on September 30, 2016 (the "Initial Term"), unless mutually extended by written agreement of the parties or unless sooner terminated as provided herein. City and Manager shall have the right, but not the obligation, upon their mutual agreement to extend the term of this Agreement for two (2) additional periods of five (5) years each, commencing on the expiration of the Initial, subject to such additional or other terms and provisions as the parties may agree in writing. The preceding sentence shall not obligate either party to extend the term of the Agreement. The failure of either party to agree to an extension of the term of this Agreement shall not be deemed a breach by such party of the covenant of good faith and fair dealing. If a party is interested in pursuing negotiations to extend the term of the Agreement, the party shall provide notice to the other party not later than twelve (12) months prior to the expiration of the then-current term of the Agreement. No less than six (6) months prior to the expiration of the existing term of the Agreement, the parties shall enter into an extension of the Agreement or provide notice that the Agreement will not be extended.
- B. If the date of commencement differs from that noted above in Section 2.03, A., the parties shall immediately execute an amendment to this Agreement setting forth the date of commencement of the term.
- C. The provisions of this Section 2.03 are subject to the provisions of Section 2.20, which sets forth the right to terminate this Agreement, without cause.

2.04 **General Management of Tennis Complex**

Manager recognizes that its operation hereunder is a service to users of the Tennis Complex and the public. Manager shall conduct its operations in a quality, efficient, courteous, and accommodating manner. The Director shall have the right to make reasonable objections to the quality and character of articles sold and services offered to the public, the prices charged and the appearance and condition of the premises utilized by Manager for its operations.

Manager shall promptly discontinue or remedy any such objectionable practice upon notification by the Director.

Manager shall operate and manage the tennis complex, pro shop and food & beverage operations and facilities in a quality manner, comparable to similar facilities and services in the area of McKinney, Texas and its environs.

A. **Tennis Professional Services – General**

Manager shall provide all tennis complex management and operations, including, but not limited to, the following: sell, rent, store and/or repair tennis equipment; sell tennis clothing and supplies; provide instructional services in the playing of tennis; and rent ball machines, all in accordance with its proposal and with the other provisions of this Agreement.

Manager shall be responsible for all services, equipment, supplies and personnel for the administration, staffing, operation and maintenance of the premises at the Tennis Complex Premises as the Director may from time to time specify for Manager's operations.

1. **Equipment Rental**
Manager shall maintain for rental an adequate and reasonable inventory of tennis equipment to adequately meet the public's need.
2. **Equipment Repair**
Manager shall maintain proper facilities, equipment and devices for the repair of all types of tennis equipment and shall make available outsource options for the repair of the general public's equipment.
3. **Lessons**
Manager shall provide a full range of tennis instruction including, but not limited to, beginners to advanced, individual and group, and all age groups. Manager shall conduct at least three junior tennis programs each year.
4. **Ball Machine Rental**
Manager shall maintain for rental an adequate number of tennis ball machines to reasonably meet the demands of the public patronizing the tennis complex.

Manager shall maintain a minimum of two (2) electric high volume, professional grade, tennis ball machines and shall increase the number of carts if necessary to reasonably meet the demands of the public patronizing the tennis complex.

5. **Court Rental**

Manager shall provide complete tennis complex Court Rental services, in accordance with the prevailing rules established by the Director, including but not limited to: controlling starting times, taking reservations for court times, scheduling tournaments, and collecting rental fees and all other applicable tennis complex fees.

Manager shall purchase, maintain and operate all equipment and supplies necessary for the operation of the rental system, including but not limited to: a point of sale system which shall issue a receipt and keep a permanent record for each sale and business transaction; an automated web based court-time reservation system for utilization at Gabe Nesbitt Park Tennis Complex; telephones, wiring and all equipment necessary for the operation of the automated reservation system at Gabe Nesbitt Park Tennis Complex; and a computer system.

Manager shall provide tournament scheduling services, in accordance with the prevailing rules established by the Director, including but not limited to, reserving tournament dates, processing reservation agreements, arranging for tournament assistance, collecting court fees and other fees associated with tournament play, and supplying services. Manager shall provide to the City on a monthly basis, a current schedule of all proposed tournaments to be held at Gabe Nesbitt Park Tennis Complex, and each such request shall be subject to the written approval of the Director.

Manager shall honor all contracts for tournaments and events that have been approved by City and are not in conflict with previously scheduled and approved tournaments. City shall provide Manager a complete list of all contracted events thirty calendar days prior to the date set for Manager to commence performance of services hereunder.

Manager shall be fully responsible for the collection of all court fees, reservation fees, and all other monies associated with the operation of the starter system. Manager shall be solely responsible for maintaining its own bank account for the fees collected, including account reconciliations and bookkeeping related to the fee revenues. Manager shall account for and deliver to the City of McKinney all such monies due to City in accordance with provisions contained within this Agreement.

Manager shall keep complete records of account(s) with regard to all monies collected hereunder. Manager shall also be responsible for and shall keep neat, readable court sheets. Manager shall, throughout the term of this Agreement, comply with Director's policy statement(s) regarding the collection of all fees, reporting requirements for fees collected, and the system of accountability and procedures therefore. All accounting records and starting sheets shall at all times be completely available for

examination by the Director, the Auditor and/or an authorized representative.

a. **Days and Hours of Operation**

Manager shall keep the pro shop open every day, (except Thanksgiving Day, Christmas Day, New Year's Day; with partial closing on Easter, July 4th, Christmas Eve and New Year's Eve) including Sundays and holidays. The minimum hours of operation shall be from 8:00 a.m. – 10:00 p.m. Monday to Saturday and 8:00 a.m. – 8:00 p.m. on Sunday, with the exception of closures required by weather conditions. Any changes in the days and hours of operation heretofore prescribed shall be subject to the approval by the Director.

In the event that the Tennis Complex is closed or play must be temporarily suspended at the Tennis Complex facility due to inclement weather conditions or complex maintenance activities previously approved in writing by the Director, the decision on when to allow play to resume, and when to allow players back out at the Tennis Complex, will be made by Manager in accordance with City tennis complex policies.

b. **Fees**

Manager shall charge and collect tennis complex fees according to a fee schedule approved by Resolution of the City Council. City reserves the right to keep or to change the fee schedule in its sole discretion. (Exhibit B)

B. **Merchandise**

Manager shall purchase, provide and maintain such inventory of tennis merchandise as is necessary for proper service to the public. Inventory shall include, at a minimum, the following: clothing with tennis complex logos for men and women; racquets and bags; accessories such as balls, grip tape, sweat bands, etc.

City reserves the right to prohibit the sale or rental of any item of merchandise which is deemed objectionable or beyond the scope of this Agreement, as determined by the Director in his sole discretion.

Manager shall offer for sale only goods of premium quality. For such goods, Manager shall charge fair and reasonable prices.

Manager shall set prices for services and shall be in conformance with the range of prices for the same or similar operations at similar establishments in the area of

McKinney and its environs or consistent with the cost of providing services to the public.

Manager shall set prices for retail merchandise and shall be in conformance with the range of prices for the same or similar items at similar establishments in the area of McKinney and its environs or consistent with the cost of providing items for sale to the public.

When an item has a suggested retail price pre-marked and established by the manufacturer or distributor, Manager shall not charge the public a price higher than such suggested retail pre-marked price.

Manager shall submit a complete, written services price list, and a general list of types of merchandise to be sold, to the Director within ten (10) days after the start of Manager's operations. Thereafter and throughout the term of this Agreement, Manager shall submit written notification to the Director prior to the inception of any subsequent changes to services or prices.

Manager shall, at all times, post rates and prices for all items offered for sale and all services offered at locations designated by the Director.

C. **Tennis Professional**

A "Class A: USPTA Professional" shall be on site full-time and shall provide lessons and perform all other, similar services set forth in the City of McKinney Tennis Policy Manual. The playing of the game of tennis shall be taught only by qualified instructors whose qualifications have been approved in writing by the Director

D. **General Manager**

A General Manager shall be on site full-time and shall provide for the customer service needs of the Pro Shop. The General Manager will ensure excellence in customer service and provide proof of initial customer service training for Pro Shop staff. It is expected that customer service and meeting the needs and challenges of the tennis community will be a prime focus of the General Manager. In addition, General Manager shall submit for the Director's approval a schedule setting forth hours of operation for the pro-shop. Any curtailment or decrease of this service is subject to the prior written approval of the Director.

E. **Custodial Maintenance Service**

Manager shall provide custodial maintenance services, including, but not limited to, the obligations to: mop, wash, sanitize, vacuum, to ensure a clean, inviting and safe Pro Shop environment for the patrons while keeping the Pro Shop in good repair and to provide the necessary maintenance of any appurtenant structures and equipment. It is expected that the Manager devise a set of maintenance standards

to maintain the tennis complex and related areas at a level of quality that will ensure its longevity.

F. **Food and Beverage Services**

1. **Sale of Food and Beverages**

Manager is hereby authorized and required to sell snack foods and beverages, upon obtaining all required permits, on the tennis complex and within the Pro Shop in accordance with its proposal and provisions of this Agreement. Manager shall also provide catering services for tournament events or groups utilizing the tennis complex. In addition, Manager shall maintain all equipment, and related structures in good working condition in accordance with City standards and manufacturers' recommendations.

2. **Days and Hours of Operation**

The Tennis Complex Premises shall be available for use, at a minimum, during the hours of 8:00 a.m. – 10:00 p.m. Monday through Saturday and 8:00 a.m. – 8:00 p.m. Sunday. Provided, however, that the Tennis Complex may be closed all day on Thanksgiving Day, Christmas Day, New Year's Day; and closed for part of the day on Easter, July 4th, Christmas Eve and New Year's Eve.

The above days and hours of operation shall be complied with unless advance written authorization to deviate from this schedule has been obtained from the Director.

3. **Food and Beverage Products**

Manager shall provide and maintain the necessary inventory of snack food and beverage products required to satisfy the public demand therefor. All such products sold or kept for sale by Manager shall be quality, wholesome and pure, and shall conform to the applicable Federal, State and City food laws, ordinances and regulations in all respects. No adulterated, misbranded or impure articles shall be sold or kept for sale by Manager, and all food and beverage products kept on hand by Manager shall be stored and handled with due regard for sanitation. In the event that Manager's food and beverage products are deemed by the Director to be less than quality, wholesome and pure, Manager may be ordered to, and if so ordered shall, improve the quality of any such food or beverage product kept or offered for sale.

G. **Advertising and Promotional Materials**

1. **Advertising**

Manager shall not promulgate nor cause to be distributed any advertising or promotional materials unless prior approval thereof is obtained from Director. Said approval shall not be unreasonably withheld or delayed and approval shall be deemed to be given if no objection is made within fourteen (14) days following the Director's receipt of the request for approval. Such materials include, but are not limited to, advertising in newspapers, magazines and trade journals, and radio and/or television commercials.

Manager shall, as a part of this Agreement, work with the Director, City officials, tennis organizations and tournament promoters in promoting tennis and this Tennis Complex.

Manager shall use its best efforts to develop and maintain cooperative working relationships with the aforesaid persons and other interested organizations in order to provide the best programs and services possible for the public.

2. **Credit in Promotional Materials**

Any advertising or promotional materials promulgated by Manager shall contain the words "The City of McKinney's Gabe Nesbitt Park Tennis Complex" or the City's logo, unless specifically approved otherwise by the Director.

3. **Website Information**

Manager shall maintain a City of McKinney tennis website for the Tennis Complex and will provide URL links to the City's website. City shall provide one or more URL (links) for Manager's website on City's website.

H. **Optional Services**

Manager shall have the right of first refusal to provide such optional services, if any, as may from time to time be requested by the Director for the Tennis Complex. The need, demand, nature and extent of such optional service shall be determined by the Director, at his sole discretion. Notwithstanding any provision to the contrary, if, in the sole opinion of the Director, it is appropriate and in the best interests of the City to offer the right of first refusal for a particular service to some other concessionaire or person, such decision shall not be contested. Should Manager decline to provide any such service upon request by the Director, Manager acknowledges that the Director will proceed to make such other arrangements therefor as deemed by the Director to be appropriate, and Manager

shall make no claim or assertion of any further right or entitlement with respect to such matters.

2.05 **Tennis Complex Facilities**

A. **Equipment and Improvements**

Manager accepts the Tennis Complex Premises in the condition existing when occupancy is granted by City. Manager shall maintain such facilities with all such appliances and equipment as may be necessary or convenient to Manager's operations hereunder. A "start-up" inventory (Exhibit A) of equipment shall be purchased by the City.

City shall permit Manager to use whatever City-owned equipment, if any, that City may subsequently place at such facility. Any such equipment used by Manager shall be taken "as is", inventoried, repaired or renovated, if necessary, and returned to City at the end of the term hereof in as good as or better condition than originally provided for Manager's use. Any equipment which has exhausted its useful life shall be disposed of in accordance with City surplus requirements. The City shall retain proceeds of any sale.

Manager shall make no refurbishment or alterations to the facilities, whether in whole or in part, nor construct additional improvements upon the said premises without the prior written approval of the Director. Title to such improvements shall immediately vest and be vested in City at all times during and after the term hereof. If, at any time during this Agreement, Manager makes any improvements to the Tennis Complex, as authorized by the Director, the cost of the improvements may be deducted from the annual operating payment(s).

Manager shall not execute any chattel mortgage, conditional bill of sale, financing statement, lease or security agreement pertaining to any such improvements, furniture, fixtures, fittings, or equipment in such premises without the prior written consent of the Director.

Manager hereby acknowledges the title of City in and to the Tennis Complex Premises and the improvements located thereon, and covenants and agrees never to assail, contest or resist said title, nor to assert with respect thereto any property interest of Manager.

Upon expiration or earlier termination of this Agreement, Manager shall surrender the Tennis Complex Premises and all appurtenances to City in a good state of repair, reasonable wear and tear excepted, and Manager shall repair any damage to such Tennis Complex Premises and appurtenances as necessary to the satisfaction of the Director. Manager shall be responsible for any damage caused by any risk which Manager is required to insure against pursuant to Section 2.19.

B. Maintenance and Repair

Manager shall be responsible for the safety, maintenance and repair of the Tennis Complex Premises, equipment and appurtenances thereto, in conformance with and at a service level as is standard in the industry.

Manager shall provide and maintain in its employ personnel that can upkeep and maintain the courts to ensure their longevity and playability. Manager must also employ sufficient personnel to perform all work as scheduled and required for the complex by City.

In regard to emergency services, Manager will provide City with the names and telephone numbers of at least two (2) qualified persons who can be called by City representatives when emergency maintenance conditions occur during hours when Manager's normal work force is not present. City shall call for such assistance only in the event of a genuine and substantial emergency.

Manager shall purchase and maintain all necessary supplies, equipment and material of good quality and sufficient number to fulfill the requirements of this Agreement and to accomplish an acceptable and professional level of maintenance. Supplies and materials shall include, but not be limited to:

- All necessary supplies and spare parts for all equipment;
- All necessary netting replacements parts, straps, ropes and etc, for court nets;
- Parts necessary for the repair and maintenance of the water station system, and appurtenant equipment;
- Courts signs, court score systems, trash receptacles, trash receptacle liners, and all other pertinent tennis complex equipment; and
- Materials for proper maintenance of court drains.

Manager shall maintain and operate the premises in a clean, safe, wholesome, and sanitary condition, free of trash, garbage, or obstructions of any kind, and in compliance with any and all applicable present and future laws, general rules and regulations of any governmental authority in force now or at anytime during the term of this Agreement relating to sanitation, public health, safety, or welfare.

Manager shall perform acceptable housekeeping and maintain and repair all improvements on the premises. All such maintenance, repairs and replacements shall be of quality equal to or better than the original in materials and workmanship. Manager shall perform proper and timely maintenance.

Manager shall remedy without delay any defective, dangerous, or unsanitary conditions. Manager shall correct such situation within twenty-four (24) hours of notice of same.

The Director may, at any time, without notice, enter upon the tennis complex premises, to determine if repairs, housekeeping and maintenance satisfactory to City are being performed.

Regularly scheduled inspections of the premises and Manager's operations authorized herein shall be made by City. The written report of such inspections shall be recorded, retained for reference, and forwarded to Manager.

The Manager or his representative shall meet with the Director or his representative once every four (4) weeks and at such other times as may be required by City to Manager's performance under this Agreement and to discuss any problems or other matters as determined by City.

Manager shall supply its own janitorial service, including window washing and refuse containers, and shall keep the premises used and occupied by it in a neat, clean, and sanitary condition at all times. Manager shall be further responsible for cleaning and maintaining public restrooms. Restroom maintenance will consist of one complete and thorough cleaning prior to opening each day and a restroom inspection every three (3) hours minimum, with restroom supply restocking and necessary cleaning performed as needed.

C. **Garbage and Utilities**

Manager shall provide a complete and proper arrangement for the adequate sanitary handling and disposal away from Gabe Nesbitt Park Tennis Complex and all related facilities of all trash, dry and wet garbage, and other refuse resulting from, or in any way associated with, Manager's use of the Tennis Complex Premises. City is under contract with a 3rd party refuse collector/hauler for solid waste services. Through consultation with the City's solid waste provider, City and Manager, appropriate disposal units will be made available for use by Manager.

To the extent feasible and practical, the Manager shall establish and implement a program for the recycling of waste materials accumulated upon the premises, to include food and beverage concession materials and landscape debris.

Manager shall process for payment all electrical power, gas, water, sewer, and telephone services provided to the Tennis Complex Premises and any and all connection fees and other charges associated therewith.

The Manager shall explore and take advantage of any rate savings options offered by utility providers, and implement resource conservation practices related to its operations hereunder where practical.

2.06 **Manager's Personnel**

Manager shall employ a full-time, General Manager and Tennis Professional (as outlined in section 2.04) within 45 days of the date of execution of this Agreement and shall continuously employ such on site during term of this Agreement. Failure to employ and retain such a General Manager and Tennis Professional, as specified herein, shall be cause for default under Section 2.20 of this Agreement.

Manager's activities and operations at Gabe Nesbitt Park Tennis Complex shall be supervised by one or more active, qualified, competent, and experienced employee(s) of Manager, not younger than 21 years of age. A General Manager shall be on site full time during tennis complex operations; Manager may designate the Tennis Professional as duly authorized to act for the General Manager in all aspects of its day-to-day operations. Manager shall notify Director when the General Manager is absent and shall designate an employee to act as the General Manager during the General Manager's absence.

Manager's personnel shall at all times while on duty at Gabe Nesbitt Park Tennis Complex be clean and neatly groomed, courteous, efficient, and attired in a suitable uniform as approved by the Director. Manager's personnel shall perform its operations authorized hereunder in a business-like manner, without rudeness or discourtesy to any person, or use of profanity.

Manager shall at all times maintain a high standard of customer service to the public, to the satisfaction of the Director who shall be the sole judge of the adequacy thereof. Upon written notice by the Director that the conduct of any of Manager's personnel at Gabe Nesbitt Park Tennis Complex is detrimental to the best interests of the public, or to City, Manager shall, within twenty-four (24) hours thereafter, furnish evidence satisfactory to the Director of correction of such deficiency.

2.07 **Staffing and Hours of Operation**

Manager shall staff its operation with personnel to conduct all operations authorized hereunder, in sufficient number to meet public demand for prompt, courteous, and efficient service.

2.08 **Notice of Personnel Changes**

Manager shall, in writing, inform the Director of the full name and specific assignment of each of its key personnel used in performance of this Agreement. Manager shall thereafter notify the Director, in writing, within forty-eight (48) hours following any such key personnel changes. Manager shall provide, to the Director, a monthly report of all personnel changes.

2.09 **Operating Budget**

Manager is solely responsible for the formulation and implementation of operating programs, business plans, and Operating Budgets for the Tennis Complex. It is the Manager's responsibility to monitor its adherence to the Operating Budget on an ongoing basis. Any

expenditure included in the Operating Budget shall be considered an Operating Expense, for which Manager assumes sole and full responsibility.

2.10 **Operating Payments**

During the first year of the Initial Term, Manager shall remit to the City a lump sum payment of Two Thousand Five Hundred Dollars (\$2,500) per month of operation, during the first year of this Agreement, or eight (8%) percent of the Gross Receipts, whichever is greater, as defined in Section 1.04, by September 15, 2012. Thereafter, beginning October 1, 2012 and on a quarterly basis during each year thereafter, Manager shall prepay to the City a quarterly payment of Seventy-Five Hundred Dollars (\$7,500) throughout the term of this Agreement. Manager shall pay to City eight percent (8%) of every dollar of its Gross Receipts exceeding \$375,000 for any fiscal year (October 1 – September 30) of this Agreement (“Percentage Payment”). Quarterly payments are due no later than the 15th of the month following the applicable quarter of operation throughout the term of this Agreement. The Percentage Payment shall be made by November 1 of each calendar year, with the Percentage Payment based upon a statement showing the total Gross Receipts for the preceding fiscal year ending September 30. Sums paid hereunder are subject to reconciliation and adjustment as provided in Section 2.14 hereto.

First payment term does not begin until initial operating date of contract and not upon contract execution date. Initial operating date of contract refers to the date upon which the tennis center is open and available for use of paying customers.

In the event of any extension of this Agreement pursuant to subparagraph D of Section 2.02, Manager shall continue to pay City the operating payment pursuant to the terms of this Agreement for such extension period, unless otherwise agreed to by City and Manager.

Manager shall submit all such payments at the Office of the Director. Any payment made by check shall be payable to the order of the City of McKinney.

2.11 **Improvement Fund**

Within ten (10) days after execution of this Agreement, Manager shall pay to City the sum of Ten Thousand and no/100ths Dollars (\$10,000.00), to be used by City for the purchase of capital equipment for the Tennis Complex. The capital equipment purchased with the money paid to City under this section shall be the property of the City and shall not be considered real or personal property of Manager’s.

The provisions of this section are not deemed liquidated damages.

2.12 **Records and Reports**

Manager shall prepare and maintain an adequate set of records, in detail and methodology satisfactory to the Director and the Auditor, documenting all Gross Receipts, as defined in Section 1.04, and operating expenses pursuant to this Agreement. Such method shall include the keeping of the following records:

- A. Regular books of accounting, such as general ledgers;
- B. Cash receipts and cash disbursements journals, including any supporting and underlying documents such as invoices, vouchers, checks, tickets, bank statements, etc.;
- C. State and Federal income tax returns and sales tax returns and checks and other documents proving payment of sums shown, which City shall keep in confidence to the extent allowed by law;
- D. Cash register tapes (Daily tapes may be separate but shall be retained so that from day to day the sales can be identified) and tennis starter sheets.

Manager shall record all sales by means of cash registers which publicly display the amount of each sale and automatically issue a customer's pre-numbered receipt or verify the amount recorded on a slip. Said cash registers shall in all cases have locked-in sales totals and transaction counters which continuously accumulate and which cannot, in any case, be reset and, in addition thereto, a tape located within the register on which transaction numbers and sales details are imprinted. Beginning and ending cash register readings shall be made a matter of daily record. In the event of a technical or electrical failure of the cash registers, Manager shall record by hand all collections and issue a sequentially pre-numbered customer's receipt in like manner. Under no circumstances shall Manager conduct sales which are not recorded or for which customer receipts are not issued.

- E. Any other reporting records that the Director deems necessary for proper reporting of receipts and disbursements.

If at any time the Director or the Auditor deems Manager's accounting practices or procedures inadequate or not in accordance with City procedures, Manager shall make all requested adjustments to its practices and procedures.

Concurrent with submittal of the quarterly Operating Payment, Manager shall submit to the Director a written report, in a format and in detail satisfactory to the Director, of all Manager's gross receipts from all operations at Gabe Nesbitt Park Tennis Complex during the preceding quarter. Such report shall include, without limitation, a daily breakdown of such gross receipts.

- F. Preparation of operating budgets.
- G. Preparation of reports with respect to all financial aspects of the Tennis Complex, such as payroll data, cash receipts, accounts receivable, budget reports and detailed profit center information;

- H. Maintenance of accounting records and preparation of annual financial statements of the Tennis Complex and related facilities in accordance with generally accepted accounting principles, consistently applied, including all footnotes and disclosures required by the City's outside auditors.

2.13 **Financial Statement and Miscellaneous Reports**

In addition to such other reports as may be required by this Agreement, Manager shall submit the following reports to City:

A. **Financial Statement**

Within forty-five (45) days following the last day of this Agreement, or upon early termination of this Agreement prior to the end of the term, Manager shall submit a financial statement covering all business transacted by it at Gabe Nesbitt Park Tennis Complex and related facilities during such period, and all Gross Receipts, commissions and other income derived by Manager therefrom.

Such financial statement shall be compiled by an independent certified public accountant, and shall be in a format, and in detail, satisfactory to the Director.

Such accounting shall include a balance sheet, income statement, statement of cash flows, and all applicable footnotes.

B. **Miscellaneous Reports**

Any other financial or statistical reports reasonably requested by the Director from time to time during the term hereof shall be provided by the Manager, without cost to the City, within a reasonable period of time.

2.14 **Reconciliation of Operating Payments**

Manager is required to provide the City with a monthly report concurrently with its quarterly payment. The City will reconcile this report with starter sheets and other source documents to determine if all Gross Receipts have been included in the report. If an error is found, the City will contact the Manager immediately.

2.15 **Retention of Records**

Manager shall retain all its books and records of account consistent with the City's record retention policy and in no event less than two (2) calendar years following the last day of the term of this Agreement, or any extension thereof. Such books and records of account shall show all Manager's gross receipts, commissions, and other income derived from its operations, pursuant to this Agreement, all deductions there from, supporting documents, and all other information required by this Agreement.

Manager shall retain such books and records of account, and such reports and records as may be required of it, or requested by City, pursuant to this Agreement, at a location within the City of McKinney, and shall keep and maintain the same in accordance with generally accepted accounting principles.

2.16 Audit and Access to Manager's Records

Upon written notification by City, Manager shall make all of its financial records available to City at the business office of Manager including, but not limited to, general ledger, original entry journals, cancelled checks, invoices, bank statements, federal and state payroll and income tax filings and financial statements. Manager shall provide such access to its records for City's purposes in verifying information submitted by Manager in any report or financial statement required or requested of Manager pursuant to this Agreement, and for City's purposes in verifying Manager's compliance with the terms of this Agreement, but for no other purpose.

Further, at any time within two (2) calendar years following the last day of the term hereof, upon written notification to Manager, City may, at its sole cost and expense, inspect, audit, and copy Manager's books, records of account, and supporting documentation relating to Manager's operations at Gabe Nesbitt Park Tennis Complex and related facilities. City, its agents, or auditors may inspect, audit, and copy such books, records of account, and supporting documentation for City's purposes.

If any such inspection and audit establish that additional Operating Payment funds are due to City, Manager shall pay the same within thirty (30) days following demand therefore from City with interest from the date such amount was due City, but not paid, at an annual rate of ten percent (10%) per annum. In the event of a discrepancy of more than three percent (3%) between Manager's gross receipts, commissions, or other income as established by such inspection and audit, and such gross receipts, commission, or other income as reported by Manager pursuant to any financial reports submitted by Manager to City, Manager shall, upon demand, reimburse City for all its costs in connection with such inspection, audit, and copying.

2.17 Permits and Licenses

Manager shall obtain and maintain in full force and effect throughout the term of this Agreement any and all applicable permits and business licenses which may be required by any law, including administrative regulations and local ordinances, for the conduct of Manager's operations hereunder.

Within ten (10) calendar days following award of this Agreement, Manager shall furnish the Director with copies of all such permits and licenses.

2.18 Insurance

Manager shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Agreement by the Manager, its agents, representatives or employees. City shall retain the right at any time to review the coverage, form, and amount of the insurance

required hereby. If in the opinion of the City's Risk Management Office the insurance provisions in these requirements do not provide adequate protection for City and for members of the public, City may require Manager to obtain insurance sufficient in coverage, form and amount to provide adequate protection. City's requirements shall be reasonable but shall be imposed to assure protection from and against the kind and extent of risks that exist at the time a change in insurance is required.

- A. Coverage shall be at least as broad as:
 - 1. Commercial General Liability coverage
 - 2. Workers' Compensation insurance as required by the State of Texas and Employer's Liability Insurance.
 - 3. Automobile Liability, (any auto).
 - 4. Employees Liability insurance

- B. Manager shall maintain limits no less than:
 - 1. General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
 - 2. Employer's Liability: \$1,000,000 per accident for bodily injury or disease.
 - 3. Workers' Compensation: Statutory. In addition, Manager shall require each of its agents, licensees, subcontractors, or suppliers to provide such workers compensation coverage to their employees coming on the premises of Gabe Nesbitt Park Tennis Complex or related facilities in connection with this Agreement.
 - 4. Automobile Liability: \$1,000,000 per accident for bodily injury and property damage.

- C. Any deductibles or self-insured retention must be declared to and approved by the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retention as respects the City, its officers, officials, employees and volunteers; or the Manager shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.

- D. All insurance policies required by this Agreement are to contain, or be endorsed to contain, the following provisions:

1. The City, its officers, officials, employees, agents and volunteers are to be covered as insureds as respects: liability arising out of activities performed by or on behalf of the Manager; products and completed operations of the Manager; premises owned, occupied or used by the Manager; or automobiles owned, leased, hired or borrowed by the Manager. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees, agents or volunteers. The City shall be included in all required policies as named insured.
 2. For any claims related to this project, the Manager's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees, agents and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, agents or volunteers shall be excess of the Manager's insurance and shall not contribute with it.
 3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City, its officers, officials, employees, agents or volunteers.
 4. The Manager's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
 5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City. However, ten (10) days' advance written notice of cancellation is permitted for non-payment of premium.
- E. Insurance is to be placed with insurers with a current A. M. Best's rating of no less than A-VII. The City Liability and Property Insurance Manager may waive or alter this requirement, or accept self-insurance in lieu of any required policy of insurance if, in the opinion of the Liability and Property Insurance Manager, the interests of the City and the general public are adequately protected.
- F. Within ten (10) calendar days following award of this Agreement, Manager shall furnish the Director with certificates evidencing coverage required above. **Certified copies of required endorsements must be attached to certificates provided.**

All certificates are to be received and approved by the City before work commences. The City reserves the right to require that Manager provide complete, certified copies of any policy of insurance offered in compliance with these specifications. As an alternative to insurance certificates, the Manager's insurer may voluntarily provide complete, certified copies of all required

insurance policies, including endorsements, affecting the coverage required by these specifications.

2.19 Early Termination of Agreement

- A. Except as otherwise provided, if Manager defaults in the performance of any promise, term, condition, or covenant required of it herein, and fails to cure such default within ten (10) calendar days following notice thereof from the Director, unless a longer cure period is approved in writing by Director, this Agreement shall terminate: provided, however, the Director shall be authorized to immediately terminate this Agreement, without serving such notice of default to Manager, upon the happening of any of the following events:
1. The failure of Manager to maintain in full force and effect all forms of insurance required hereunder.
 2. The failure of Manager to maintain in full force and effect any permit, license, or USTPA, Tennis Pro rating required hereunder.
 3. Any sale, transfer, or assignment by Manager of any right, license, privilege, or duty granted to or imposed upon it hereunder.
 3. A major breach of service including, but not limited to, insufficient hours of operation or health or safety violations which cause or may cause closure of all or any part thereof of the Tennis Complex Premises.
 4. Failure to employ as a permanent, full time, on site member of staff a General Manager and Tennis Professional within 45 days of the date of execution of this Agreement.
- B. If, in the event Manager cannot or does not operate the Tennis Complex Premises in accordance with the terms and conditions stated herein, and the Director terminates this Agreement, the Director may take immediate possession of the Tennis Complex Premises and operate the facilities in any manner deemed appropriate by the Director for City's benefit and the public's best interests, without any liability therefore to Manager.

2.20 Right to Terminate Agreement

Notwithstanding any provision herein to the contrary, including the provisions of Section 2.03, if the City determines it to be in the best interests of the City to terminate this Agreement, the City may, acting through the Director, terminate this Agreement and the term thereof, without penalty or cause, in the City's sole discretion, upon thirty (30) days' written notice of intent to terminate given to Manager.

In the event that Manager determines it to be in Manager's best interest to terminate this Agreement, the Manager may terminate this Agreement and the term thereof, without penalty or

cause, in Manager's sole discretion, upon thirty (30) days' written notice of intent of intent to terminate. Provided, however, that Manager may not terminate this Agreement without cause during the tennis season, which is generally March through September. In addition, Manager shall refund any pre-paid fees, deposits or other monies collected by Manager; such refund shall not entitle Manager to offset of any Gross Receipts payable to City. Manager shall pay a pro-rated quarterly payment to City in the event of early termination under this section based upon eight percent of Gross Receipts, without offset, or \$7,500, whichever is more.

Notwithstanding any provision of this Agreement to the contrary, in the event funds for the Tennis Complex Premises are not approved by the City Council for the next fiscal year, the City retains the right to terminate this Agreement at the expiration of each City budget period (September 30) during the term of this Agreement, without prior notice.

Should Manager fail, after ten (10) days' notice from City of the need thereof, to perform its obligations required hereunder, City may, but shall not be obligated to, (in addition to all other available remedies) exercise its right to terminate this Agreement as provided hereinafter and enter upon the premises and perform Manager's said failed obligations, using any equipment or materials on the premises suitable for such purposes. Manager shall forthwith, on demand, reimburse City for its costs so incurred, including direct and indirect overhead costs as determined by the Director.

2.21 Operator's Non-Compliance and Liquidated Damages

- A. If the Director determines that there are deficiencies in Manager's performance of the Tennis Complex operations authorized and required herein, the Director will provide, as specified in Section 2.19 herein, a written notice to the Manager to correct said deficiencies within specified time frames.
- B. In the event that Manager fails to correct the deficiencies within the prescribed time frames the Director may, at his option: (1) use the Contract Security provided for herein in Section 2.11; (2) exercise its rights of entry pursuant to Section 2.20 herein; and (3) in the event the security deposit is insufficient to cover the City's damages, assess liquidated damages as provided in subsection C herein.
- C. The parties agree that it will be impracticable or extremely difficult to fix the extent of actual damages resulting from the failure of the Manager to comply with the obligations for tennis complex operations and maintenance herein required, authorized, and specified in Section 2.04. The parties hereby agree that under the circumstances a reasonable estimate of such damage is \$100 per day for each day the deficiencies exist, and that Manager shall be liable to City for liquidated damages in said amount in the event the security deposit is insufficient to cover said damages.

2.22 **Tennis Complex Evaluation Report**

- A. City and Manager agree that the overall condition and playability of the Tennis Complex, the quality of service provided by Manager, and the condition of the buildings thereon is of primary importance to both parties. As this Agreement specifies the standards of performance deemed necessary for proper maintenance and services, City and Manager will develop a Tennis Complex Evaluation Report to document Manager's performance pursuant to those standards.
- B. City Tennis Complex Evaluation Report will be completed by an authorized representative(s) of the Director after an inspection of the Tennis Complex by City's representative(s). City shall make every reasonable effort to conduct such inspections on a regular basis, and Manager or his authorized representative will be invited to participate in the inspection tour of the premises.
- C. The Director reserves the right to modify, update, and/or amend the general content and format of the Tennis Complex Evaluation Report forms in order to provide for a suitable instrument for the documentation of Manager's performance.

2.23 **Director's Inspection**

Manager shall provide access for inspection of the tennis complex by the Director and the City Recreation and Park Commission, or a committee thereof. The inspection shall occur not less than bi-annually or more frequently than monthly. The inspection shall also cover Manager's pro shop and food and beverage area and shall include a briefing on tennis complex operations by Manager.

2.24 **Nonassignability**

Manager shall have no right, authority, or power whatsoever to sell, assign, or transfer any right, license, privilege, or duty granted to or imposed upon it hereunder. Such right, license, privilege, and duty are granted and imposed solely and personally to and upon Manager, and any such sale, assignment, or transfer shall result in immediate termination hereof.

2.25 **Conflict of Interest**

Manager represents that neither it nor any of its officers, partners or employees have a financial interest in the subject matter of this Agreement, other than the right to receive payment from City for the services performed.

No director or officer of Manager shall have any interest in any concession activities at the Tennis Complex or its related facilities or in any contract involving the Tennis Complex without prior approval by the Director.

ARTICLE III: GENERAL CONDITIONS

3.01 **Authority of the Director**

The Director shall administer this Agreement on behalf of City.

Unless otherwise provided herein, or required by applicable law, the Director shall be vested with all rights, powers, and duties of City hereunder.

With respect to matters hereunder subject to the approval, satisfaction, or discretion of City or the Director, the decision of the Director in such matters shall be final.

3.02 **Consent**

Whenever the consent or approval of either City or Manager is required or authorized hereunder, such consent or approval shall not be unreasonably withheld, unreasonably conditioned, or unreasonably delayed.

3.03 **Time of the Essence**

Time is of the essence in the performance of this Agreement.

3.04 **Independent Contractor**

- A. It is understood and agreed that Manager (including manager's employees) is an independent contractor and that no relationship of employer-employee exists between the parties hereto. Manager's assigned personnel shall not be entitled to any benefits payable to employees of City. As an independent contractor, Manager hereby indemnifies and holds City harmless from any and all claims that may be made against City based upon any contention by any third party that an employer-employee relationship exists by reason of this Agreement.
- B. It is further understood and agreed by the parties hereto that Manager in the performance of its obligation hereunder is subject to the control or direction of City as to the designation of tasks to be performed, the results to be accomplished by the services hereunder agreed to be rendered and performed, and not the means, methods, or sequence used by Manager for accomplishing the results.
- C. If, in the performance of this Agreement, any third persons are employed by Manager, such person shall be entirely and exclusively under the employment, direction, supervision, and control of Manager. All terms of employment, including hours, wages, working conditions, discipline, hiring, and discharging, or any other terms of employment or requirements of law, shall be determined by Manager.
- D. It is further understood and agreed that as an independent contractor and not an employee of City, neither the Manager nor Manager's assigned personnel shall

have any entitlement as a City employee, right to act on behalf of City in any capacity whatsoever as agent, nor to bind City to any obligation whatsoever.

- E. It is further understood and agreed that Manager must issue W-2 and 941 Forms, or any other required federal or state documentation, for income and employment tax purposes, for all of manager's assigned personnel under the terms and conditions of this Agreement.

3.05 **Indemnification of City**

The Manager shall indemnify, defend, and hold harmless, protect and defend the City, its officers, agents, employees, and representatives from any and all claims, losses, liabilities, or damages, demands, costs and expenses, including payment of reasonable attorneys' fees, that occur or are alleged to have occurred in whole or in part as a result of the negligence or fault of Manager, its employees, agents, representatives, and consultants, whether such claims, losses, liabilities, damages, costs, and expenses are caused in part by an individual or entity indemnified under this Agreement. Manager's indemnification obligation shall not include indemnification for an indemnitee's own negligence nor shall it include the duty to defend for concurrent negligence claims against both Manager and the City.

3.06 **Release of Liability**

City shall not be liable for, and is hereby released from, any and all liability to Manager, Manager's insurance carrier, or to any person claiming under or through Manager for any loss or damage whatsoever to the property or effects of Manager resulting from the discharge of water, or other substance, from pipes, sprinklers, conduits, containers, appurtenances thereof or fixtures thereto, or from any damage resulting from the discharge or failure of electric current, regardless of cause or origin, except that which is caused by the act of negligence of City, its officers, employees, or agents.

Further, Manager shall be solely responsible for the safety and security of property, equipment, supplies, merchandise, and commodities used or offered for sale by Manager at Gabe Nesbitt Park Tennis Complex and related facilities. City shall have no liability or responsibility whatsoever, and Manager shall make no claim against City, with respect to such matters.

3.07 **Signs**

Manager shall place no sign, emblem, or advertising, of any kind or character, at or on the Tennis Complex without the advance written approval of the Director.

3.08 **Notices**

Any notice, demand, request, consent, or approval, that either party may or is required to give the other, shall be in writing and shall be either personally delivered, sent by certified mail, return receipt requested or sent by prepaid first class mail addressed as follows:

To Manager: Lifetime Tennis, Inc.
2309 Country Hollow Lane
Garland, Texas 75040-4038

To City: City of McKinney
1550 S. College, P.O. Box 517
McKinney, Texas 75070
Attention: Parks and Recreation Director

With Copy To: Mark S. Houser
City Attorney
City of McKinney
222 N. Tennessee, P.O. Box 517
McKinney, Texas 75070

3.09 **Tennis Complex Promotion**

Manager agrees to advertise and promote the facilities operated by the Manager to foster a favorable business environment, stimulate patronage, and support City efforts to maximize use of the Tennis Complex.

In furtherance of this purpose, Director agrees to advertise in the Department of Parks and Recreation Guide no fewer than two (2) times during per year, and to participate in other promotional events of the Department as requested by the Director.

3.10 **Notice of Claims and Suit**

City and Manager shall each give the other prompt and timely written notice of any personal injury or accident and of any lawsuit coming to its knowledge, when either such claim or lawsuit arises out of or is in any way connected with the construction or operations of Manager hereunder, the construction or operation of Gabe Nesbitt Park Tennis Complex and related facilities by City which in any way, directly or indirectly, contingently or otherwise, might reasonably affect the parties' relationship under this Agreement.

Such notice shall be deemed prompt and timely if given within thirty (30) calendar days following the date of receipt of such claim by an officer, agent, or employee of either party, and, if given within ten (10) calendar days following the date of service of process upon either party with respect to any such lawsuit.

3.11 **Employee Parking**

Vehicular and equipment parking by Manager, its officers, agents, employees, licensees, suppliers, or subcontractors shall be restricted to such areas at Gabe Nesbitt Park Tennis Complex and related facilities as are designated by the Director.

3.12 **Applicable Law**

This Agreement shall be interpreted and enforced in accordance with the laws of the State of Texas, and shall be deemed to have been made, and shall be performed, in the State of Texas. Venue shall be in Collin County, Texas.

3.13 **Nondiscrimination Clause**

Manager shall not discriminate in the provision of services because of color, race, creed, national origin, religion, sex, sexual orientation, age, or physical or mental handicap in accordance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d), the American with Disabilities Act (42 U.S.C. Section 12131 et seq.), and all other applicable laws and regulations requiring no discrimination.

3.14 **Equal Opportunity/Minority/Women Business Enterprise Participation Requirements**

The City of McKinney is an Equal Opportunity Employer. Manager shall comply with Federal, State, and City Equal Employment opportunity requirements.

3.15 **Equal Employment Opportunity**

Manager shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin, in violation of the law. Manager shall take affirmative action, as necessary, to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin, in violation of the law. Such action shall include but not be limited to the following: Employment, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

3.16 **Compliance**

Manager shall comply with all applicable federal, state, and City statutes, ordinances, regulations, directives, and laws and this Agreement shall be deemed to be executed and performed wholly within Collin County, State of Texas and construed with and governed by the laws of the State of Texas.

3.17 **No Warranty Regarding Tennis Complex**

City does not warrant that Gabe Nesbitt Park Tennis Complex will continue to be used as a tennis complex during the term of this Agreement. In the event that such use is terminated, Manager shall neither claim, nor be entitled to any damages whatsoever from City.

3.18 **Entire Agreement**

This Agreement, together with all exhibits attached hereto, constitutes the entire Agreement between the parties hereto, and all other representations or statements heretofore

made, verbal or written, are merged herein, and this Agreement may be amended only in writing, and executed by duly authorized representatives of the parties hereto.

3.19 **Nonwaiver of Rights**

No waiver of default by either party of any of the terms, covenants, and conditions hereof to be performed, kept, and observed by the other party shall be construed as, or shall operate as, a waiver of any subsequent default of any of the terms, covenants, or conditions, herein contained, to be performed, kept, and observed by the other party.

3.20 **Force Majeure**

The City shall not be deemed in violation of this Agreement if it is prevented from performing any of its obligations hereunder by reason of strike, boycott, labor dispute, embargo, or shortage of energy or materials. Neither City nor Manager shall be deemed in violation of this Agreement if either is prevented from performing any of its obligations hereunder by reason of acts of God, acts of a public enemy, acts of superior governmental authority, weather conditions, riot, rebellion, sabotage, or any other circumstances for which it is not responsible or which are not reasonably within its control.

3.21 **Headlines**

The headings of the articles and sections of this Agreement are inserted only as a matter of convenience and for reference and do not define or limit the scope of intent of any provisions of this Agreement, and shall not be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

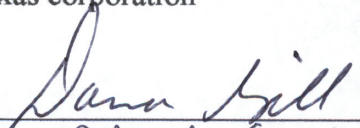
CITY OF MCKINNEY
a Texas municipal corporation

By: 
JASON GRAY, CITY MANAGER

By: Joe Williams, Deputy City Manager
an authorized signatory

Date: 2-3-12

LIFETIME TENNIS, INC.
a Texas corporation

By: 
BY: DANA GILL

Title:
PRESIDENT & CEO

Date: 1/5/12

(SEAL)

ATTEST:

Sandy Hart 1/5/12

SANDY HART, TRMC, MMC
City Secretary
BLANCA GARCIA
Deputy City Secretary



APPROVED AS TO FORM:

[Signature]

MARK S. HOUSER
City Attorney

EXHIBIT "A": Start-up Inventory

Opening Day/Marketing Funds

See allowance below

Pro Shop Operations:

Computer x 1

Phone x 2

Flat Screen TV's x 2

Slatwall system

PA and or Security allowance \$6000

(separate from allowance listed below)

Additional ports for TV's in restrooms

Proshop furniture

Interior decorator treatment

Offices:

Computer x 1

Phone x 2

Office furniture

Maintenance Equipment:

See allowance below

Multipurpose room:

Refrigerator

Tables and chairs

Programming Equipment:

See allowance below

Plaza:

Ice machine

Patio Equipment:

Patio furniture

TV incl. mounting/security hardware

Allowance

\$30,000 can be used for any items related to the operation of the tennis complex. This will allow operator to prioritize equipment/materials.

Exhibit "B": McKinney Tennis Complex Fees

2012 - 2013 Court Usage & Lesson Fees*

Annual Court Use Fees

- Resident Family (2-4 people) - \$350 per year
- Resident Adult - \$200 per year
- Resident Senior - \$180 per year
- Resident Youth - \$125 per year
- Non-Resident Family - \$450 per year
- Non-Resident Adult - \$250 per year
- Non-Resident Youth - \$150 per year
- Add'l Family Members - \$100 per year

Single Use Fees

Hourly Court Fees (charge is for court time, not per player)

- Resident Youth - \$6
- Resident Adult - \$12
- Non-Resident Youth - \$7
- Non-Resident Adult - \$14
- Adv. Group Reservations - \$20
- for outside group rentals

Daily Use Fees (individual fee)

- Resident Youth - \$6
- Resident Adult - \$12
- Non-Resident Youth - \$7
- Non-Resident Adult - \$14

Ball Machine Service

- 1 hour use - \$15
- 3 month "anyday" pass - \$119
- 6 month "anyday" pass - \$179

- Prices include applicable court use fee

Lessons

- Private types (private, semi, group) - \$70 an hour
- P&R classes and camps - \$15 an hour (8:1 student to teacher ratio)
- Competition programs - \$20 an hour (6:1 student to teacher ratio)

* Listed fees and student ratios will serve as maximums. Fees and ratios may be offered at lower amounts.

EXHIBIT "C": Tennis Complex Site Map